UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
KETCHIKAN PULP COMPANY,	)	CWA Appeal No. 95-4
	)	
Respondent.	)	
	)	

EPA'S RESPONSE BRIEF TO RESPONDENT'S APPEAL OF INITIAL DECISION TO THE ENVIRONMENTAL APPEALS BOARD

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INTRODUCTION

The U.S. Environmental Protection Agency ("EPA") hereby responds to Ketchikan Pulp Company's ("KPC's") appeal of the Initial Decision in In the Matter of Ketchikan Pulp Co., Docket No. 1089-12-22-309(g). This Response is filed pursuant to 40 C.F.R. Section 22.30(a)(2). For the reasons set out below, the Environmental Appeals Board should affirm the Presiding Officer's Initial Decision regarding Respondent's liability for the cooking acid spill and the flocculent and sludge discharges.

RECITATION OF FACTS

On August 16, 1989, an inspector with the Alaska Department of Environmental Conservation ("DEC") was on a business flight passing over the KPC mill near Ketchikan, Alaska, when she noticed a large plume in the receiving waters near the mill's outfalls. Tr. at 150, 152. She photographed the plume from the air, Ex. C-3, and reported the discharge to her office when she landed.

Alaska DEC sent one of its inspectors, Amy Crook, to investigate on August 17, 1989. During her inspection she observed foam and scum floating on the surface of Ward Cove. Ms. Crook took photographs, Exhibits C-4 to C-13, and collected samples. Tr. at 155-158, Exhibit C-2 (inspection report). After speaking with the mill manager, Ms. Crook determined that the plume of foam and scum was caused by the sludge KPC drained from its 9.3 million gallon aeration basin in the mill's wastewater treatment plant, and by the accumulated flocculent KPC drained

from the 3 one-million-gallon settling tanks at the mill's water purification plant. See Exhibit C-2; Tr. at 203. At the time of these discharges, salmon were gathering in Ward Cove waiting to migrate up Ward Creek to spawn. Tr. at 170, Initial Decision at 40.

On September 13, 1990, KPC had another major discharge to Ward Cove. On that date, a plant operator attempted to fill an improperly sealed wood digester with magnesium bisulfite (cooking acid) and spilled 4,450 gallons of the acid onto the floor of the plant.[1] The company used fire hoses to wash the product into the floor drains, which discharge to Ward Cove without treatment. Initial Decision at 7; Tr. at 93.

In 1990, the Agency filed the instant action against KPC. In the Amended Complaint, EPA alleged that the flocculent discharge and the cooking acid spill were unpermitted discharges. The Agency also alleged that KPC had violated Section III.F of its NPDES permit by discharging sludge from its aeration basin to Ward Cove and concomitantly violated one of the permit's reporting requirements for KPC's failure to report the discharge

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[1]KPC refers throughout its brief to the discharge of "cooking liquor." See e.g., Respondent's Brief at 22. At the hearing, however, during the direct examination of the mill manager, Mr. Higgins, and in its Post-Hearing Brief, KPC referred instead to the discharge as cooking acid. See, e.g., Transcript at 245-250, Respondent's Post-Hearing Brief at 13, 16-18. We presume the two terms to refer to the magnesium bisulfite that KPC uses to break down the wood chips into wood fibers. "Liquor" typically refers to the spent cooking acid that contains lignin dissolved from the wood chips. See Tr. at 95. Here, of course, KPC discharged unspent cooking acid.

to EPA. The present appeal follows from the Presiding Officer's rulings in favor of EPA on the two unpermitted-discharge claims and the claim of discharging sludge in violation of KPC's permit.

ARGUMENT

I. THE PRESIDING OFFICER CORRECTLY INTERPRETED THE SCOPE OF KPC'S PERMIT.

Resolution of EPA's claims against KPC for the cooking acid spill and the flocculent discharge ultimately turned on the Presiding Officer's interpretation of the scope of KPC's NPDES permit. Respondent has relied on the so-called "permit-as-a-shield" defense, which finds its roots in section 402(k) of the CWA. Section 402(k) states in relevant part:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. . . ."

33 U.S.C. § 1342(k).

Section 402(k)'s intent is straightforward: Compliance with one's permit constitutes compliance with the Act. See E.I. duPont Nemours & Co. v. Train, 430 U.S. 112, 138 n. 28 (1977). This simple proposition, however, begs the question what discharges are authorized by one's permit. Every individual NPDES permit is unique, so the resolution of the scope of a permit at bottom must be grounded in the nature of the discharge and the language of the permit and the permit application.

The Presiding Officer in the present case considered the regulatory history Respondent now cites, the scant case law on

this issue, and the facts of this case before concluding that KPC's permit did not authorize the disputed discharges. For the reasons set out below, Respondent's arguments misconstrue EPA's regulations and the Presiding Officer's holding. Respondent's arguments fail because they are not supported by the authority cited.

A. NPDES Permits Do Not Authorize Undisclosed Discharges.

Respondent argues that the Presiding Officer erred "in framing the issue in terms of whether specific wastestreams have been described in the permit application since KPC did everything it was required to do by complying with the regulations governing permit applications." The cornerstone of the permit shield defense is, and must be, full disclosure in the permit application. Section 402(k) does not extend to discharges of pollutants or waste streams that have not been disclosed by the permittee in the permit application or otherwise clearly identified in the permit application process.

If there is full disclosure of the activities to be conducted and the effluent to be discharged, then the permit's requirements represent the conditions under which the disclosed discharge is authorized. But to the degree a permit applicant does not fully disclose to EPA the nature of its discharge, the permit writer cannot know what limits to impose either through numeric effluent limits or best management practices. Once the permit is issued, the scope of the permit cannot be construed to include discharges that were not expressly or implicitly

disclosed by the respondent and, therefore, never contemplated by the permit writer.

Respondent misinterprets the Presiding Officer's holdings regarding the permit shield defense. It argues, "if a particular wastestream has not been specifically identified in an application, the complainant's position would dictate that such a wastestream was not covered by the permit regardless of how insignificant the wastestream." Respondent's Brief at 20. To the contrary, the Presiding Officer's holdings were premised on what pollutants or waste streams EPA reasonably could have expected KPC to discharge based on the information disclosed in KPC's permit application. The rationale of the Initial Decision would allow for the discharge of unidentified waste streams if they could reasonably be expected to be part of the operating system described in the permit application or if EPA otherwise knew to expect specific pollutants to be present as a result of an identified industrial process.[2]

While many courts have restated the basic premise of section 402(k), see e.g., EPA v. Calif. ex rel. State Water Resources Control Bd., 426 U.S. 200, 223 (1976); PIRG of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 68 (3d Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991), few have addressed the issue of

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[2]For example, an EPA permit writer could be deemed to expect large raw cooking acid spills as a normal constituent of a mill's effluent if EPA had found such spills to be a frequent or regular part of the industrial operation when developing the technology-based effluent standards.

what constitutes compliance with one's permit. The Presiding Officer's summary of case law interpreting section 402(k) shows that the courts are not unanimous in their approach to the issue. Respondent has latched on to two of those cases in an attempt to show that KPC's permit's silence regarding cooking acid and flocculent amounted to an approval to discharge those substances.

Respondent cites Atlantic States Legal Foundation v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993), cert. denied, 115 S. Ct. 62 (1994), for the proposition that permit holders may discharge pollutants not specifically addressed in their permits. The Agency agrees with this general proposition, with certain restrictions. See *Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits* (July 1, 1994) at 2-3. If an applicant properly discloses a specific pollutant or waste stream, and the permit writer does not place in the permit a specific numeric limit, BMP, or other condition addressing that pollutant or waste stream, the permit holder is free to discharge the pollutant within the limits of the permit as long as it complies with all relevant notification requirements.

Kodak does not mean, as KPC argues, that applicants may discharge any pollutant in any quantity as long as the pollutant was not specifically prohibited in the permit. See 33 U.S.C. § 1311(a) ("Except as in compliance with . . . [section 402] . . ., the discharge of any pollutant by any person shall be unlawful.") In the Kodak case, a citizens group sued Kodak for

discharging without a permit after learning that the company was discharging small quantities of various pollutants not addressed in the permit. In the present case, KPC was held liable for discharges of undescribed wastestreams and for spills, not for discharges of undisclosed pollutants that one would expect to find in its effluent. In particular, the Presiding Officer ruled against KPC for draining 3 one-million-gallon settling tanks (when it only listed "filtration backwash" as a wastewater source in its application) and for an accidental spill of 4,500 gallons of raw cooking acid,[3] neither of which were waste streams one would expect to find in the effluent described in KPC's permit application. Initial Decision at 27, 29-30.

Respondent's reliance on McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988) is also misplaced. In that case, defendant had specifically applied for a permit for discharges of volatile organic compounds. While no effluent limits were placed on the discharge of those substances in the permit, the permit did provide for monitoring. Thus, the permit writer was aware of the discharge and specifically covered it in the permit in the form of effluent monitoring requirements. EPA agrees that in cases where the permit applicant properly has disclosed a pollutant or waste stream, and EPA does not place an effluent limit in the permit for that pollutant or waste stream, discharges consistent

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[3]These discharges were not, as KPC terms them, "environmentally insignificant." Respondent's Brief at 21.

with the information disclosed in the application would be lawful. If the pollutant or waste stream is not disclosed, however, it is not authorized under the permit and the section 402(k) defense does not apply.

B. The Flocculent Discharge Was Not Authorized Because Respondent Did Not Disclose its Intent to Drain its Water Treatment Settling Tanks to Ward Cove.

The Presiding Officer held that section 402(k) shields KPC from liability only if the company properly disclosed the nature of its water treatment plant discharge in its permit application. The issue presented here is whether the discharges disclosed in KPC's permit application, which listed "filtration backwash" as the effluent from the water treatment plant, encompassed draining flocculent to Ward Cove from the treatment plant's three one-million-gallon settling tanks. The question is a factual one of whether KPC disclosed the settling tank discharge, or whether EPA otherwise was on notice during the permit application process that "filtration backwash" included discharging the contents of the settling tanks.

Respondent contends in this appeal that the Presiding Officer erred "in ruling that the discharge of flocculent was not covered by the permit because KPC did not submit enough information describing its discharges." Respondent's Brief at 13. Respondent argues that the permit application forms used by EPA call for only general descriptions of effluent streams and that KPC complied with those general requirements in its permit application. Respondent's Brief at 16. KPC describes the

Agency's effort to distinguish between filtration backwash and flocculent from the settling tanks as "hypertechnical," Respondent's Brief at 19, and argues, as it did at hearing, that the settling tank discharges were a normal part of the effluent stream it set out in its permit application. The Presiding Officer rejected these arguments. He held:

> . . . Respondent contended that filtration backwash, which was disclosed in the application (Ex. R-2, p.4), is the same substance as flocculent (Tr. 227-28). While the evidence was in conflict on this (Tr. 5-53, 228-29, 277), it is more reasonable to conclude that this filtration backwash and flocculent are different. The flocculent is not discharged by backwashing but is drained directly through a separate line as shown on Ex. R-5. And, in resolving the conflicting testimony, it is warranted to find that flocculent is a heavier, more settled substance than the suspended filter backwash solids that are backflushed into the outfall. It follows from this analysis that flocculent was not specifically covered as part of the discharge in the permit application.

Initial Decision at 24-25.

If KPC had intended to request permission to discharge all effluent streams from the water treatment plant, including the settling tanks, it should not have listed "filtration backwash" in the permit application. See Exhibit R-2 at "Page 1 of 4." Rather, if KPC were seeking approval to drain the settling tanks, it should have identified simply "water treatment plant" or, more specifically, "settling tanks and filtration backwash" in the appropriate box on its application form. The Presiding Officer concluded based on the facts before him that KPC only requested permission to discharge filtration backwash from the rapid sand filters.

Respondent cites no development documents or regulations that would indicate in any way that the Agency considers filtration backwash and settling tank flocculent to be the same things. The Presiding Officer made the factual finding that the two are not the same and that by listing "filtration backwash" in its permit application, KPC did not give notice to EPA that it intended to drain its settling tanks to Ward Cove. The Presiding Officer's ruling is a reasonable resolution of the facts of this case and should be sustained.

C. The Presiding Officer Properly Characterized the Cooking Acid Spill as Outside the Scope of the Permit.

The question with regard to the cooking acid spill is similar to the issue posed above for the flocculent discharge, *i.e.*, is an unintended spill of 4,500 gallons of raw cooking acid authorized by the permit. Respondent argues that because the discharge resulted from a spill and EPA had considered spills a normal part of plant operation, it was authorized. In rejecting this argument, the ALJ reasoned that the spill was not within the scope of the permit because "[c]ooking acid is a recyclable material that is not expected to be discharged since it is not in the interest of KPC to discharge this reusable material." Initial Decision at 29-30.

In his ruling on KPC's Motion to Reopen the Hearing, the Presiding Officer further explained his rationale:

> It goes without saying that a spill of this magnitude, caused by an unexpected human error, was clearly not part of normal operations. In point of fact, substantial testimony established exactly the opposite,

> that cooking acid, being a recyclable material, is not expected to be discharged during normal operations nor is it in KPC's interest to discharge this reusable material. Moreover, there was extensive testimony that such a large discharge of spilled raw cooking acid was not disclosed in the application as part of normal effluent discharges nor would it have been permitted if requested.

Order Denying Respondent's Motion to Reopen Hearing at 11 citation omitted).

The ALJ's decision hinged on the quantity and nature of spill. "Under the circumstances, where unexpected human error caused the spill, no viable argument can be made that such a spill could have been foreseen and taken into account as part of the application process, thereby making the discharge one allowed implicitly under the permit."[4] Initial Decision at 30. "It is not necessary, therefore, to sort through the parties' arguments on the nuances in the NPDES Regulations and the background documents relating to spills and spill technology, because the cooking acid spill in this cause was not one that could be reasonably anticipated or defended against. . ." Id.

Respondent relies heavily on the argument that EPA considered spills to be a normal constituent of a pulp mill's effluent, and therefore KPC did not have to disclose spills in its permit application in order to be protected under Section 402(k). Respondent's Brief at 24-26. EPA offered testimony at hearing that the Agency did not consider large spills to be a

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Cf. *Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits* (July 1, 1994) at 3 (spills generally not permitted).

normal effluent constituent, Tr. at 65, and had EPA been aware that KPC intended to wash large cooking acid spills untreated into Ward Cove, it could have imposed best management practices on such discharge in the permit. Tr. at 126.

In support of this argument, KPC cites the *Development Document for Interim Limits and Proposed Effluent Limitations Guidelines and Proposal for New Source Performance Standards for the Bleached Kraft, Groundwood and Sulfite, Soda, Deink and Non-Integrated Paper Mills*, 36 (EPA 440/1-76/047-a) (January 1976). Respondent misinterprets the documents. The development documents state that spills are "a common problem" but finds that "internal control measures" such as "collection of spills, and prevention of accidental discharges" are available to the industry. See Ex. R-3A at 282-83. Dan Bodien, EPA's National Pulp & Paper Expert, who was a principal author of the development document, Tr. at 21:4-7; 23:1-5, and who coincidentally prepared the KPC permit, testified at the hearing that the Agency considered spill control technology would be incorporated by the industry. He testified:

> Most mills . . . will provide some type of spill control, ponding or tankage, in order to divert those types of spills into those systems. Those that don't have ponds, like I say, will have tankage. In a lot of cases, this material is valuable to the company so they don't want to necessarily waste it. And if they can recover it, it has value to them, they can reuse it in the process. So many mills install sumps to collect these types of waste and pumpage to pump them to tanks where this material can be re-utilized in the process. And spill prevention and control is part of acceptable practice at chemical pulp mills. So the discharge of these types of spills directly to the receiving water

is not considered acceptable practice.

Tr. at 65 (emphasis added). The Agency therefore did not consider 4,500-gallon raw material spills within the mill to be normal effluent constituents when it promulgated the effluent guidelines for the pulp and paper industry.

II. THE PRESIDING OFFICER'S HOLDING REGARDING THE DRAINING OF UNTREATED SLUDGE TO WARD COVE WAS CORRECT.

Complaint alleged, and the Presiding Officer found, that KPC violated Section III.F. of its permit when it drained the untreated sludge from its 9.3 million gallon aeration basin directly to Ward Cove. Section III.F. of KPC's NPDES permit states:

> Solids, sludges, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

Ex. R-1 at 10.

The aeration basin is part of KPC's wastewater treatment system. The wastewater treated in the aeration basin typically is run through a clarifier to remove most of the solids prior to discharge. Initial Decision at 11. In August, 1989, KPC departed from this normal procedure. In order to perform work on the aerators, KPC bypassed the clarifier, and drained the sludge from the aeration basin directly to Ward Cove. After most of the water had been drained off the aeration basin, fire hoses were trained on the sludge mass to force it down the drain. Tr. at

264-265. By bypassing the clarifier, KPC discharged over nine million gallons of untreated sludge to Ward Cove. Approximately 97% of the solids discharged by KPC from the 9.3 million gallon aeration basin would have been removed by the clarifier had KPC not bypassed it. See Tr. at 37:8-11.

A. The Presiding Officer Properly Rejected KPC's Bypass Defense Because a Bypass Was Not Necessary.

In its challenge to the Presiding Officer's holding regarding the sludge discharge, Respondent argues primarily that the discharge was a lawful bypass, undertaken pursuant to Section III.G.1. ("Bypass not exceeding limitations") of its permit. Respondent argues that the emptying of the sludge from the aeration basin into Ward Cove was lawful because it was essential for maintenance purposes and KPC did not violate its effluent limits.

The regulation upon which Section III.G.1. of the permit is based states:

> Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

40 C.F.R. § 122.41(m)(2). On its face, this bypass provision does not apply to KPC's sludge discharge. The first prerequisite to its application is that no effluent limitations are violated. Respondent maintains that it did not violate its TSS limit despite the large plume next to outfall 002. See Exhibit C-3. The Presiding Officer held, however, that KPC discharged sludge

in violation of section III.F of the permit, and Section III.F. is an effluent limitation.

Even if KPC had not violated III.F., the bypass would not have been lawful. The court in United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir. 1993), amended and rehearing en banc denied 35 F.3d 1275 (9th Cir. 1994), cert. denied, 115 S. Ct. 939 (1995), rejected the same argument KPC attempts to make here:

> In establishing the guideline prohibiting bypass except where necessary for essential maintenance . . . the EPA explained that "[g]enerally, maintenance is that which is necessary to maintain the performance, removal efficiency and effluent quality of the pollution control equipment. However, for the purposes of this section, it is necessary to distinguish between maintenance that is 'essential' and that which is routine." 49 Fed. Reg. 38,037 (1984). . . . [I]f it is possible to perform the maintenance "with no loss in treatment plant performance," the maintenance is not considered "essential" for purposes of the bypass exception.

Id. at 1532 (emphasis added).

Relying in part on the EPA comments to the final rule promulgating section 122.41(m), the Presiding Officer rejected KPC's necessity argument, concluding that KPC could have obtained pumps capable of emptying the aeration basin to the clarifier for a "moderate sum of $2,000." Initial Decision at 32-34 (citing 49 Fed. Reg. 38037 (Sept. 26, 1984)). "[T]here existed an inexpensive, readily available means to empty the sludge from the aeration basin into the settling tank, and, in the exercise of reasonable engineering judgement, KPC should have used portable pumps as back-up equipment to prevent the bypass." Id. at 34-35.

> In the instant case, the sludge discharge occurred when the plant was in a non-process operation mode since the plant was shut down due to a drought. KPC did not show that the sludge discharge maintenance was one that could not wait until the production process was not in operation. Rather, the plant was not in operation because of the drought, and it was fortuitous for the Respondent to perform this maintenance with the plant in a shut down condition. The facility was not shut down for the purpose of performing the sludge discharge maintenance to assure efficient operation. Therefore, this maintenance must be considered routine, rather than essential and Section II G 1 of the permit cannot be used by KPC to justify its bypass of the use of the settlement tanks in the secondary treatment system in making the aeration basin discharge.

Id. at 33.

Contrary to KPC's argument that EPA is attempting to limit the bypass defense to "emergency situations," Respondent's Brief at 33, the Agency only requires that the bypass be essential. The Presiding Officer found, based on the evidence, that KPC reasonably could have emptied the aeration basin without bypassing the clarifier and draining the sludge untreated into Ward Cove. Initial Decision at 34. All the company had to do was pump the sludge into the clarifier for normal treatment. Instead, to save $2,000, KPC chose to discharge over 9 million gallons of untreated sludge straight into Ward Cove. The Presiding Officer was correct to reject KPC's bypass defense.

B. There Is No Conflict Between Permit Sections III.F and III.G.

Respondent argues that the removed substances provision (section III.F.) does not take precedence over the bypass provision (section III.G.1.). Since it complied with the bypass provision, KPC argues, the EPA was "without authority to limit or

prohibit discharges associated with essential maintenance." Respondent's Brief at 31-32. EPA agrees that had KPC undertaken a lawful bypass pursuant to Section III.G.1 of the permit, EPA would not have the authority to allege a violation of section III.F. The Agency, of course, disagrees that KPC's draining of 9.3 million gallons of sludge to Ward Cove without treatment was a lawful bypass. As argued above, the bypass defense does not apply in this case and the Board need not resolve any alleged conflicts between section III.F. and III.G. of the permit.

III. RESPONDENT HAD FAIR NOTICE OF ITS PERMIT REQUIREMENTS.

In connection with the Agency's permit shield policy and the Presiding Officer's interpretation of Sections III.F. and III.G. of the permit, Respondent raises new due process/fair notice and Administrative Procedure Act ("APA") claims that it did not raise in the proceeding below.[5] Respondent's Brief at 29-31, 33-36. For the reasons set forth below, the Board should reject these arguments.

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[5]This is the third time in this proceeding that the parties have briefed these issues. In 1991, EPA moved for accelerated decision and Respondent made a cross motion on all issues of liability in the case. All of the liability issues presented in the current appeal were thoroughly briefed at that time. In 1993, both parties filed post-hearing briefs and response briefs again debating the 402(k) and bypass defenses in detail. In none of those briefs, or at hearing, did Respondent raise the due process or APA arguments it puts now before the Board. Generally, the appellant cannot seek reversal upon a ground not raised in the trial court. See Wratchfor v. S.J. Groves & Sons Co., 405 F.2d 1061 (4th Cir. 1969).

A. The Presiding Officer's Holding Is Consistent with Prior EPA Interpretations of the Permit Shield.

Respondent argues that EPA's present interpretation of section 402(k) is new, and KPC had no fair notice of it. KPC contends that, because EPA's 1994 Policy regarding permit as a shield was never promulgated as a rulemaking, and was issued after the alleged violations in this instant matter, KPC could not have had fair notice of the Agency's interpretation of the rule. Respondent's Brief at 28-31. Assuming, *arguendo*, that KPC's argument is correct, it is nevertheless irrelevant. The Presiding Officer never cited the policy, and the record in this case does not indicate that he ever relied on it.

Respondent also errs when it asserts that the Presiding Officer's ruling represents a new interpretation of section 402(k) of which KPC had no prior notice. "Historically, EPA has viewed the permit, together with the material submitted during the application process and information in the public record accompanying the permit, as important bases for authorization to discharge under section 402 of the CWA." *Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits* (July 1, 1994) at 2-3.

In 1980, EPA wrote, "[G]eneral identification of processes contributing to wastewater effluent is necessary to identify the standards and limitations applicable to the discharge." 45 Fed. Reg. 33534 (May 19, 1980). Again, in 1984, the Agency stated:

> [EPA requires] sufficient data to identify the presence of pollutants which should be controlled through permit limitations. This is particularly important because in accordance with section 402(k) of the CWA, a permittee is deemed to be in compliance with the CWA if he meets the limitations and requirements of this permit. Thus, pollutants not prohibited or limited by the permit can be discharged unless and until the permit is modified.

49 Fed. Reg. 37998, 38002 (Sept. 26, 1984) (emphasis added). In 1985, the Agency's position was that "[t]he shield concept is based on the presumption that the permit writer had adequate information describing the nature of the pollutants to be discharged and has incorporated this information into the permit limitations." EPA Clean Water Act Compliance Manual (1985), attached as Exhibit A to EPA's Joint Reply & Response re Accelerated Decision.

B. The Bypass and Separated Solids Provisions of KPC's Permit Are Not Vague.

Respondent raises two notice arguments with respect to the sludge discharge. First it argues that EPA has interpreted the bypass provision in an unforeseen way; therefore KPC cannot be penalized for not "guessing what the agency meant" when it wrote the bypass provisions. Respondent's Brief at 33-34. Respondent also argues that because it could not have known from the face of section III.F. that draining the aeration basin directly into Ward Cove was a violation of the permit, it should not be subject to penalties for the discharge. Respondent's Brief at 34-36.

Respondent assumes by this argument that Section III.F. is ambiguous, which it is not. Contrary to Respondent's assertion, a reasonable, straightforward reading of the provision is it

prohibits the draining 9.3 million gallons of aeration basin sludge into Ward Cove without treatment. As noted above, Section III.G.1., the bypass provision, is equally easy to understand and KPC's attempts to construe it in a light most favorable to KPC does not make the provision ambiguous.

Finally, if, as KPC argues, the provisions of which KPC now complains are too vague for an average person to comprehend, then the company should have challenged the provisions at the time the permit was issued, not here in this enforcement action. See Powell Duffryn, 913 F.2d at 77-78.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests the Environmental Appeals Board to affirm the holding of the Presiding Officer regarding liability for the cooking acid spill, and the flocculent and sludge discharges.

RESPECTFULLY SUBMITTED this 27th day of November, 1996.

David Hindin, for
Mark A. Ryan, Region X
COUNSEL FOR APPELLEE

Of Counsel:
Keith Cohon, Region 10, ORC
Richard Witt, Office of General Counsel
David A. Hindin, OECA

CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing EPA's Response to Respondent's Appeal of Initial Decision to the Environmental Appeal Board in In the Matter of Ketchikan Pulp Co., CWA Appeal No. 95-4, was sent to the Environmental Appeals Board, and copies sent to the following persons in the manner indicated:

Hand Delivery:	Environmental Appeals Board U.S. Environmental Protection Agency 607 14th Street, N.W. Suite 500 Washington D.C. 20005
Federal Express:	Bert P. Krages II, Esq. 900 S.W. Fifth Avenue, Suite 1900 Portland, Oregon 97204
EPA Pouch Mail:	Mary Shillcutt Regional Hearing Clerk EPA Region 10 1200 Sixth Avenue Seattle, Washington 98101

Dated: 11/27/96

David A. Hindin, Chief
Multimedia Branch, OECA